IN THE

Supreme Court of the United States

October Term, 1978

No. 78-404

FIRST PENNSYLVANIA BANK N. A.,
Petitioner,

v.

GEORGE R. MONSEN, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This brief is filed on behalf of Respondents George R. Monsen, et al.,[1] plaintiffs in the District Court, in opposition to the Petition of First Pennsylvania Bank, N. A., for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

QUESTIONS PRESENTED.

1. Whether the Court will grant certiorari to review a question of law which was not raised in the District Court or the Court of Appeals.

2. Whether the Court will grant certiorari to review the sufficiency of evidence on issues of fact.

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1. The Respondents for whom this brief is filed are George R. Monsen; Joseph J. Obermeyer; James Delgado; Joseph Cosgrove; Robert Cosgrove; Justin Rosenstock and Eva Rosenstock as Trustees for Benjamin Rosenstock; Justin Rosenstock and Eva Rosenstock as Trustees for Renee Rosenstock; Justin Rosenstock as Parent and Natural Guardian of Benjamin Rosenstock; Justin Rosenstock as Parent and Natural Guardian of Eli Rosenstock; Justin Rosenstock as Parent and Natural Guardian of Renee Rosenstock; Claudia Rosenstock; and Eleanor Schwartz.

STATEMENT OF THE CASE.

Beginning in October of 1968, Petitioner made loans to Consolidated Dressed Beef Company, Inc. ("Consolidated"), secured by liens on substantially all of Consolidated's assets. When conducting its pre-loan investigation, Petitioner learned that Consolidated had a long standing and elaborate program of selling unregistered securities in the form of unsecured promissory notes. Funds for the notes were received as cash payments from both employees and non-employees and as payroll deductions from employees as part of a program which Consolidated called its Employees Savings Plan. Notes outstanding at the time Petitioner first lent money to Consolidated totaled approximately $600,000.

Consolidated issued the notes without registration in violation of the Securities Act of 1933 and withheld essential information about the company and the notes in violation of the Securities Exchange Act of 1934.

The evidence showed that, prior to making loans to Consolidated, Petitioner was fully informed of all aspects of the note program, knew the notes were purchased as investments without registration and knew that Consolidated was withholding essential information from the note holders, particularly facts about the financial condition of the company and the priority position Petitioner was to take with respect to substantially all of Consolidated's assets. Petitioner also knew that the noteholders would not continue to invest in Consolidated if the undisclosed information was made known to them.

With full knowledge of the deficiencies in the loan program, Petitioner required Consolidated to make a commitment that it would continue the program and expand it as a condition to receiving loans from Petitioner.

The evidence shows that the representatives of Petitioner who dealt with Consolidated were familiar with the

registration and reporting requirements of the federal securities laws and Bank officials, including a securities specialist employed by Petitioner, met with Consolidated's president (himself a lawyer) and attorney to discuss public issues of stock by Consolidated and subordination of the notes.

In accordance with its commitment, Consolidated continued the note program after loans were made to it by Petitioner and after Consolidated experienced significant financial reverses. Petitioner encouraged the sale of notes as the company's financial condition deteriorated. Petitioner even attempted to prevent the redemption of matured notes while pushing for the sale of new notes. Finally Petitioner considered Consolidated's position so weak that Petitioner seized the company and proceeded to liquidate its assets. Payroll deductions for notes continued to the day of the seizure.

Contrary to assertions in Petitioner's Statement of the Case, the record does not establish how much Petitioner received from the liquidation of Consolidated's assets nor how those funds were applied, except there is testimony that more than $3 million had been received at a time when Consolidated's real estate had not yet been sold, against total debt estimated at $4 million. Noteholders received nothing. Petitioner even refused to honor checks for interest and for redemption of matured notes that were issued before the company and its bank accounts were seized.

The case was submitted to the jury by means of special interrogatories. The answers held Petitioner liable as an aider and abettor of Consolidated's securities law violations as of October 4, 1968, the date of the first loan agreement between Petitioner and Consolidated. Consolidated was held liable on all outstanding notes.

ARGUMENT.

The Court Should Deny the Petition Because the Only Issue on Review Would Be Sufficiency of the Evidence to Support Findings of Fact.

A. Introduction.

Petitioner has framed three Questions Presented for review. Logically, the third question should come first, and Respondents will discuss the questions in that order. It will be shown that the third question was not raised in the courts below and that the first two questions actually call for a review of the sufficiency of the evidence.

B. The Court Should Not Grant Review on the Issue of Whether Civil Liability May Be Imposed for Aiding and Abetting Violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 Because That Issue Was Not Raised in Either the District Court or the Court of Appeals.

The third of Petitioner's Questions Presented inquires whether civil liability can be predicated on aiding and abetting violations of the federal securities laws. Appendix A to this brief (A1) is the "Motion for Judgment Notwithstanding The Verdict By Defendant First Pennsylvania Bank, N. A." which Petitioner filed in the District Court. Appendix B (A4) to this brief is the "Counter-Statement Of Issues Presented For Review" and "Summary Of Argument" from Petitioner's brief filed in the Court of Appeals. Neither of these documents raises the issue on which Petitioner now seeks review.

The Court has held on numerous occasions that it will not review questions which have not been raised below.

Usery v. Turner Elkhorn Mining Co., 428 U. S. 1, 37 (1976); *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 163-164 (1975); *Tacon v. Arizona*, 410 U. S. 351 (1973); *Ramsey v. United Mine Workers of America*, 401 U. S. 302, 312 (1971); *Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U. S. 317, 330, *reh. denied* 386 U. S. 1027 (1967); *McCullough v. Kammerer Corp.*, 323 U. S. 327 (1945). There is nothing in this case which would warrant departure from that rule and the Court should not grant review on this issue.

C. Whether Civil Liability Should Be Imposed on Petitioner in This Case Is a Question of Sufficiency of the Evidence and Raises No Issues for Which the Court Should Grant Review.

Since the only issue raised and passed on in the District Court and the Court of Appeals was whether the evidence was sufficient to support the jury verdict, that is the only question open for review in this Court. Petitioner attempts to clothe the issue in language which makes it appear as an issue of law by asking whether civil liability may be imposed "without proof of either knowledge by the Bank that the issuer was committing securities law violations or intent by the Bank to violate the securities laws" (Petition 2)[2]. The question would properly be framed as

2. Respondents are at a loss to explain the statement on page 8 of the Petition that "the Third Circuit's standard of liability . . . imposes liability even though the Bank acted without actual intent to deceive, manipulate or defraud, *as specifically found by the jury.*" (Emphasis supplied). There is no such jury finding. And the Court of Appeals specifically held that the evidence was sufficient to prove manipulative intent and to establish scienter:

> [W]e hold that the Bank's knowledge of the company's intention not to disclose the subordinated position of the noteholders and the Bank's intention to take advantage of the noteholders' junior status is sufficient proof of manipulative intent to fulfill the scienter requirement and thereby support the Bank's aiding and abetting liability. (Petition A19 n. 17).

an issue of law if the District Court had charged or the Court of Appeals had held that liability could be imposed without such proof. But that did not happen in this case. Both knowledge and intent were required to be found as a basis of liability.

The District Court charged that in order to hold Petitioner liable the jury had to find knowledge by Petitioner of the wrongs committed by Consolidated and conscious assistance by Petitioner:

> The second element is the aider or the abettor must *know* the wrongs [sic] existence.
>
> . . . .
>
> In aiding and abetting liability the key is *actual knowledge* of the aider and abettor's role in the wrong. There must be *knowing* substantial assistance *of the violation.* With regard to 10b for aiding and abetting liability, *the plaintiff must show knowing participation or conscious involvement in the fraudulent scheme.* (Emphasis supplied). (Tr. Vol. VII 83, 84-85).

The Court of Appeals likewise required a finding of knowledge and intentional assistance (Petition A11) and found that the evidence was sufficient on these points (Petition A15-A20).

Petitioner is inaccurate in picturing this case as one which permits liability to be based on inaction alone for business conducted in the ordinary course (Petition 9). Much to the contrary, the District Court charged:

> A definition that sometimes is helpful in aiding or abetting can be taken from the Criminal Law. There can be aiding and abetting only if the party involved *associates* himself with a venture, *participates* in it, and *seeks by action* to make it succeed. So your inquiry under the aiding and abetting test is did the bank involve itself in this note program, did it render substantial assistance, did it participate, did it seek to make the sale of the notes successful.
>
> . . . .
>
> The third element of proof necessary to establish the liability of an aider and abettor that is *knowingly* and *substantially participating* or [assists][3] in the role of a wrongful act *involves more than mere inaction,* unless the plaintiffs can show that the inaction was *consciously intended to assist* in the perpetration of the wrongful act. Did plaintiffs show that in this case? (Emphasis supplied).
>
> (Tr. Vol. VII 84, 85).

Petitioner has never challenged the language or the content of the charge, and therefore the only question available is the sufficiency of the evidence to meet the tests specified in the charge. The Court of Appeals summarized the evidence in holding that these tests had been met (Petition A17-A20). This is not a case in which the courts below have permitted liability to be imposed on an innocent and injured bystander.

The Court has stated that it will not grant review to measure the sufficiency of the evidence, *Besser Mfg Co. v. United States,* 343 U. S. 444, 448 (1952), or the inferences to be drawn from it, *General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175, 178 (1938), in the absence of unusual abuse by the lower court, which is not alleged here. See *NLRB v. Waterman Steamship Corp.,* 309 U. S. 206, 208 (1940). Grant of a petition for certiorari is not warranted where the issue of a violation depends on the discrete facts of the particular case. *United States v. ITT Continental Baking Co.,* 420 U. S. 223, 226-227 n.2 (1975). Writs granted in cases where petitioners have couched factual disputes as issues of law have been

3. Reads "exists" in the original.

dismissed when the factual nature of the controversy has been demonstrated *Tacon v. Arizona,* 410 U. S. 351 (1973); *Southern Power Co. v. North Carolina Public Service Co.,* 263 U. S. 508 (1924).

This case meets none of the criteria of Rule 19. No conflict in decisions is alleged, the Petitioner did not challenge the legal criteria applied to the case in the courts below and the judgment is one which applies only to Petitioner on the facts of this case. The Court should not grant certiorari in order to review the evidence.

CONCLUSION.

For the reasons stated above, Respondents respectfully request that the Court deny Petitioner's request for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

M. MELVIN SHRALOW,
Attorney for Respondents,
George R. Monsen, et al.

Of Counsel:
SHRALOW & NEWMAN.

Dated: September 28, 1978

APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-799

GEORGE R. MONSEN, et al.

v.

CONSOLIDATED DRESSED BEEF COMPANY, INC., et al.

Motion for Judgment Notwithstanding the Verdict by Defendant First Pennsylvania Bank N. A.

Defendant First Pennsylvania Bank N. A. moves the Court to set aside the verdict rendered on May 11, 1976 and the judgment entered thereon on May 27, 1976 and to enter judgment notwithstanding the verdict, in accordance with this defendant's motion for directed verdict. Defendant First Pennsylvania Bank's motion for directed verdict should have been granted because:

AIDING & ABETTING A VIOLATION OF SECTION 12 OF THE 1933 ACT

1. The evidence required a finding as a matter of law that the reissuance or renewal of a note by Consolidated without the injection of new or additional money from plaintiffs or class members does not represent the offering or selling of a security under sections 12 or 17 of the 1933 Act.

2. Section 12(1) was not intended to embrace someone who had nothing to do with the issuance of the unregistered securities. The evidence requires a finding as a matter of law that by merely entering into a commercial loan agreement with Consolidated, First Pennsylvania Bank could not have aided and abetted in a sale and delivery of unregistered securities.

3. The evidence was insufficient to warrant a finding that First Pennsylvania Bank aided, abetted with Consolidated and the Silverbergs in violation of section 12(1) or 12(2) of the 1933 Act.

AIDING & ABETTING A VIOLATION OF SECTION 10b OF THE 1934 ACT AND RULE 10b-5 THEREUNDER

4. The evidence required a finding as a matter of law that the reissuance or renewal of a note by Consolidated without the injection of any new or additional money from the plaintiffs or other class members does not constitute a "purchase or sale" of a security under section 10 of the 1934 Act and Rule 10b-5 thereunder.

5. The evidence required a finding as a matter of law that plaintiffs and class members who did not loan any additional money to Consolidated after October 4, 1968 (the date of the Bank's first loan agreement with Consolidated) are not "purchasers or sellers" under the statute and Rule and lack the standing to claim any damages against First Pennsylvania Bank.

6. Plaintiffs did not meet their burden of proving that First Pennsylvania Bank had actual knowledge of any misrepresentations and omissions by Consolidated or the Silverbergs to plaintiffs.

7. The evidence was insufficient to warrant a finding that First Pennsylvania Bank aided and abetted with Consolidated and the Silverbergs in violation of section 10(b) and Rule 10b-5 thereunder.

8. The evidence was insufficient to warrant a finding that:

a) there existed an independent wrongful act by the non-bank defendants; and

b) First Pennsylvania Bank had knowledge of that wrongful act; and

c) First Pennsylvania Bank, by its conduct, substantially assisted the non-bank defendants in carrying out an unlawful scheme.

9. The evidence was insufficient to warrant a finding that First Pennsylvania Bank's inaction was consciously intended to assist in the perpetration of the wrongful act.

CONSTRUCTIVE TRUST

10. The Court should have exercised its discretion to retain jurisdiction of the common law constructive trust set forth in Count III of the Second Amended Complaint.

11. The evidence required a finding as a matter of law that no constructive trust arose.

MILES H. SHORE
NORMAN R. BRADLEY

By: /s/ MILES H. SHORE
Miles H. Shore

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1935, 77-1936, 77-1937

Brief of Appellee First Pennsylvania Bank, N. A.

* * *

COUNTER-STATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Whether the District Court properly granted defendats' [sic] Motion for Judgment Notwithstanding the Verdict where the evidence was insufficient to warrant a finding that First Pennsylvania Bank, by its conduct, substantially assisted the non-bank defendants in carrying out an unlawful scheme.

2. Whether the District Court should have retained pendent jurisdiction of the common-law constructive trust claim and should have directed a verdict in favor of defendants against plaintiff for the reason that the evidence was insufficient to establish liability, and that as a matter of law no constructive trust arose.

* * *

SUMMARY OF ARGUMENT

I. The District Court properly granted judgment n. o. v. in favor of the Bank because the evidence was insufficient to support a jury finding of aiding and abetting by the Bank.

II. At the close of plaintiffs' case, having decided to allow the federal securities claim to go to the jury, the District Court should have exercised its discretion and retained jurisdiction of the common-law constructive trust claim and should then have granted a directed verdict on Count III in favor of defendants against plaintiffs for the reasons that the evidence was insufficient to establish liability and that, as a matter of law, no constructive trust arose.